

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned On Briefs June 17, 2009

**IN THE MATTER OF: J.R.L.-D (d.o.b. 9/1/06), A Child Under Eighteen
Years of Age**

**Direct Appeal from the Juvenile Court for Wilson County
No. 7091 Barry Tatum, Judge**

No. M2008-01921-COA-R3-JV - Filed July 1, 2009

This appeal arises from an action to terminate Mother's parental rights. The sole issue on appeal is whether the trial court erred in awarding fees to Mother's attorney and the guardian ad litem. We reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General and Elizabeth C. Driver, Senior Counsel, for the appellant, State of Tennessee, Department of Children's Services.

OPINION

On September 19, 2006, the Wilson County Juvenile Court adjudicated the minor child, J.R.D., born September 1, 2006, dependent and neglected. In September 2007, the Department of Children's Services ("DCS") filed a petition in the Juvenile Court of Wilson County to terminate the parental rights of Angela Joy Driver a/k/a Angela Joy Linton-Driver ("Mother") and the unknown biological father of the minor child J.R.D. Mother was incarcerated when DCS filed its petition, and service on the unknown father was obtained by publication. The matter was set to be heard beginning February 25, 2008, at 8:30 a.m.

Upon the sworn petition of DCS, the trial court held a hearing on November 26, 2007, and terminated the unknown father's parental rights by order entered in December 2007. On February 20, 2008, Mother surrendered her parental rights. Notwithstanding Mother's surrender,

the February 25 hearing was set to proceed as scheduled because the time for Mother to revoke her surrender had not expired.¹

The February 25 hearing of the matter was delayed by approximately two hours, however, because no court reporter was present. The Guardian Ad Litem moved the court for sanctions against DCS. Counsel for DCS stated that he believed a court reporter had been scheduled, and that he could not explain why one was not present at 8:30 a.m., when the matter was scheduled to begin. The trial court instructed counsel for DCS to file a written statement explaining why a court reporter failed to arrive when the matter was set to begin. The matter proceeded and, at the conclusion of the hearing, counsel for DCS asked the court to reserve its ruling until the ten-day surrender revocation period had passed. Mother's counsel agreed that the court should delay its ruling, and the trial court agreed to do so. The trial court scheduled a hearing to be held on March 10, 2008.

At the March 10 hearing, the parties agreed that Mother had not revoked the surrender of her parental rights. With respect to the absence of a court reporter on the morning of February 25, counsel for DCS assumed responsibility for the failure to schedule the court reporter for 8:30 a.m. On April 24, 2008, the trial court dismissed the petition to terminate as moot and entered an order terminating Mother's parental rights by voluntary surrender. The trial court also entered an order granting the oral motion of Mother's attorney and the Guardian Ad Litem for sanctions. The trial court ordered DCS to pay attorney's fees to Mother's attorney in the amount of \$180 per hour for two hours, and fees in the amount of \$195 per hour for two hours to the Guardian Ad Litem.²

DCS filed a motion to alter or amend or, in the alternative, for a stay pending appeal. The trial court heard the motions on June 23, 2008, and denied both motions. The trial court entered final judgment on July 22, 2008, and DCS filed a timely notice of appeal to this Court.

Appellees filed no brief in this Court. On April 21, 2009, DCS moved this Court to decide this matter based upon the record and the brief filed by DCS. Appellees did not oppose the motion. On May 11, 2009, this Court granted DCS's motion and the matter was assigned to the Western Section of the Court in June 2009.

¹The Tennessee Code provides:

A person who has executed a surrender may revoke the surrender at any time within ten (10) days of the date of the surrender.

Tenn. Code Ann. § 36-1-112(a)(1)(A)(2005).

²Apparently, these amounts were ordered in addition to the usual fees paid to appointed attorneys and guardians ad litem by the Administrative Offices of the Court.

Question Presented

The sole question presented by DCS for our review is “[w]hether the juvenile court erred in assessing attorney’s fees against the Department of Children’s Services where there was no statutory authority allowing such an award.”

Standard of Review

The issue presented for our review is a question of law. *See Fossett v. Gray*, 173 S.W.3d 742, 784 (Tenn. Ct. App. 2004). We review questions of law *de novo*, with no presumption of correctness afforded to the trial court. *Id.*

Analysis

In its brief to this Court, DCS asserts the trial court erred in assessing attorney’s fees against it because the State has not waived its sovereign immunity to permit the assessment of attorney’s fees against the State. DCS relies on *State ex rel. Chanaberry v. Stooksbury*, 145 S.W.2d 775, 776 (Tenn. 1940), for the proposition that the right to collect costs from the State can only be conferred by statute. It further cites *In re Harris*, 849 S.W.2d 334, 336 (Tenn. 1993), for the proposition that there is no express authority to assess attorney’s fees against the State. DCS further argues that, even if “there were general authority allowing the assessment of attorney’s fees against the State,” the general assembly has not conferred the authority to assess attorney’s fees against DCS upon the juvenile courts in Title 37 or elsewhere in the Tennessee Code.

We note, however, that this case does not present a question of whether attorney’s fees may be assessed against the State as damages or costs. Rather, in this case, the trial court awarded attorney’s fees as sanctions for DCS’s failure to schedule a court reporter to appear in court when the February 25 hearing commenced. Thus, the issue presented by this case, as we perceive it, is whether the juvenile court erred by imposing sanctions against DCS in this case.

The juvenile court has concurrent jurisdiction with the chancery and circuit courts to terminate parental rights. Tenn. Code Ann. § 37-1-104(c)(2005). Like the chancery and circuit courts, a termination of parental rights action proceeds in the juvenile court under the provisions set forth in Title 36, chapter 1, part 1. Tenn. Code Ann. § 37-1-147(2005). The Tennessee Rules of Civil Procedure govern cases involving the termination of parental rights. Tenn. R. Juv. P. 1(b)(2008). Accordingly, we must disagree with DCS’s assertion that, in this case, the juvenile court would be without authority to impose sanctions authorized by the statutes or the Rules of Civil Procedure. In this parental termination case, the juvenile court was governed by the Rules of Civil Procedure.

To the extent that DCS asserts the State has not consented to the imposition of attorney's fees against DCS as sanctions under Tennessee Rule of Civil Procedure 11, we must also disagree. Tennessee Code Annotated § 36-5-101(l)(2), for example, provides:

In any Title IV-D case, if the court grants relief, whether in whole or in part, to the department of human services or the department's Title IV-D contractor, or to any applicant for Title IV-D child support services, the court shall not tax any court costs against the department, the Title IV-D contractor or any applicant for child support services. *The court shall not award attorney fees against the department, the Title IV-D contractor or any applicant for child support services, unless there is a clearly established violation of Rule 11 of the Tennessee Rules of Civil Procedure or for other contemptuous or other sanctionable conduct.* The provisions of this subdivision (l)(2) are not intended to limit the discretion of the courts to tax costs to the individual parties on non-Title IV-D issues, such as custody or visitation.

Tenn. Code Ann. § 36-5-101(l)(2)(2005)(emphasis added).

In this case, the trial court recited no authority for its award of attorney's fees as sanctions. Although attorney conduct is sanctionable under Rule 11 of the Rules of Civil Procedure, neither the sanctioned activity nor the procedure followed in this case comport with the requirements of Rule 11.³ Rule 11 is the only authority which we find for awarding

³ Rule 11.03 of the Tennessee Rules of Civil Procedure provides:

If, after notice and a reasonable opportunity to respond, the court determines that subdivision 11.02 has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision 11.02 or are responsible for the violation.

(1) How Initiated.

(a) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision 11.02. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(b) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision 11.02 and directing an attorney, law firm, or party to show cause why it has not violated subdivision 11.02 with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (a) and (b), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on

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attorney's fees as a sanction for attorney conduct intended to "cause unnecessary delay."⁴ See *Fossett v. Gray*, 173 S.W.3d 742, 752-53 (Tenn. Ct. App. 2004). Because Rule 11 does not anticipate sanctions for the type of conduct sanctioned here, and because neither the trial court nor the parties followed the procedures required by Rule 11, we reverse the award of attorney's fees to Mother's attorney and the Guardian Ad Litem in this case.

Holding

The trial court's judgment awarding attorney's fees as sanctions to Mother's attorney and the Guardian Ad Litem is reversed. Costs of this appeal are taxed one-half to Mother's attorney, Paul Robertson, and one-half to the Guardian Ad Litem, Karen Chaffin.

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³(...continued)

motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(a) Monetary sanctions may not be awarded against a represented party for a violation of subdivision 11.02(2).

(b) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

⁴Rule 34A.02 permits the imposition of Rule 37 sanctions for the spoliation of evidence. Rule 37 is applicable to discovery sanctions. Neither is relevant to the present case. We also note that there is no suggestion of contempt in this case.